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NO. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM 1999

OLIVER & WRIGHT MOTORS, INC. et al.,
Petitioners,

v.

CITY OF HOOVER,
Respondent.

OLIVER & WRIGHT MOTORS, INC. et al.,
Petitioners,

v.

CITY OF ALBERTVILLE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

I.

Does the imposition of a tax by a local government on activities and persons outside its boundaries, for the sole purpose of generating revenue, constitute taking of property without due process of law, violating the due process guarantees of the Fourteenth Amendment of the United States Constitution?

We contend that it does.

CERTIFICATE OF INTERESTED PERSONS

Counsel for Respondent City of Albertville, et al.	Henry C. Chappell, Jr.
Counsel for Respondent City of Hoover	Roger L. Bates I. Ripon Britton, Jr. J. Ken Thompson
Counsel for Alabama Department of Revenue and Department Commissioner	Dan E. Schmaeling
Counsel for Alabama Department of Finance, Director of Finance, and State Comptroller	Jerry E. Carpenter
Counsel for City of Tuscaloosa	Timothy H. Nunnally
Counsel for Towns of Loxley, Notasulga, Samson, Faulkville, Weaver, Guntersville, Luverne, and Haleyville	C. Winston Sheehan, Jr.
Counsel for Town of Clayton	Alex L. Holtsford
Counsel for City of Tallassee and Town of Notasulga	John Smith
Counsel for Towns of McKenzie and Georgiana	P. Richard Hartley
Counsel for City of Geneva	John Knowles
Counsel for Town of Northport	Ronald L. Davis

Counsel for City of Thomasville	Edmon H. McKinley
Counsel for City of Tuscumbia	B.T. Gardner, Jr.
Mayor of Town of Dayton	William S. Poole, Jr.
Counsel for town of Loxley	L. Brian Chunn
Mayor of Town of St. Florian	Joe Lamprecht
Counsel for Town of Madison	William W. Sanderson, Jr.
Counsel for Town of Valley Head	Patrick H. Tate
Counsel for Town of Myrtlewood	William T. Coplin, Jr.
Counsel for City of Sumiton	Edward R. Jackson
Counsel for Town of Dutton	Tommy Armstrong
Counsel for City of Huntsville	Peter S. Joffrion
Counsel for City of New Hope	Douglas C. Martinson
Counsel for Towns of Hammondville and Sylvania	Terry G. Hutcheson
Counsel for City of Prattville	George E. Howell
Counsel for Town of Excel	Windell C. Owens

Counsel for City of Centreville	Richard M. Kemmer, Jr.
Counsel for Alabama League of Municipalities as Amicus Curiae	Robert C. Black Ken Smith
Petitioners' Counsel	William J. Baxley
Trial Judge	Hon. Charles Price Circuit Judge Montgomery County, Alabama, 15th Judicial Circuit
Respondents	City of Hoover, Alabama City of Albertville, Alabama and a class of similarly situated municipalities
Petitioners	Oliver & Wright Motors, Inc. and a class of similarly situated businesses
Supreme Court of Alabama	Hon. Perry O. Hooper, Sr. Hon. Hugh Maddox Hon. J. Gorman Houston Hon. Ralph D. Cook Hon. Harold See Hon. Champ Lyons, Jr. Hon. Jean Brown Hon. Douglas Inge Johnstone

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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STATEMENT OF GROUNDS OF JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254 because this Petition is from a decision of the Supreme Court of Alabama in a civil case.

(i) Date of the decision: March 26, 1999

(ii) No rehearing or extension of time has been sought or obtained

(iii) No cross petition has been filed

(iv) Jurisdiction is based on 28 U.S.C. § 1254(1) and Rule 10.1(c) of the Rules of the Supreme Court

(v) Because 28 U.S.C. § 2403(b) may apply, a copy of this petition has been served on the Attorney General of the State of Alabama.

STATEMENT OF THE CASE

(I) Nature of the Case, Course of Proceedings and Disposition

This class action was instituted by Oliver & Wright Motors, Inc. ("Oliver & Wright") on January 2, 1992 in the Circuit Court of Montgomery County, Alabama. (C.R. 1-11). Petitioners filed an Amended Complaint on November 3, 1993. (C.R. 38). Petitioners contend that *Ala. Code* § 11-51-206 (1975), which authorizes municipalities to levy a privilege or license tax and a sales tax on businesses outside the city limits but within the police jurisdiction is an unconstitutional practice because it amounts to taxation for revenue generating purposes without representation and the taking of private property without due process of law. *Ala. Code* § 11-51-206 (1975), C.R. 1-11, 438-47.

Petitioners sought relief in the form of: 1) a judgment declaring *Ala. Code* § 11-51-206 (1975) to be unconstitutional; 2) an order refunding all taxes collected from Oliver & Wright and members of the class by the Alabama Department of Revenue, Defendant Albertville,

and individual members of the Defendant class; 3) an order declaring the final assessment against Petitioner Oliver & Wright to be null and void; 4) a permanent injunction prohibiting the Department of Revenue and members of the Defendant class from collecting the tax against businesses within the police jurisdictions; 5) an award of attorneys fees pursuant to equitable common fund principles to attorneys for Petitioners and the class certified by the court; and 6) an award of such other, further and different relief as the class may be entitled. (C.R. 46).

On November 3, 1993, Petitioners filed motions to certify a plaintiff and defendant class. (C.R. 31-37). These motions were granted by the trial court and on September 29, 1994 a plaintiff class defined as:

> All businesses within the State of Alabama which operate outside the corporate limits of municipalities but within the police jurisdictions thereof which are or have been charged a local sales tax pursuant to *Ala. Code* § 11-51-206 (1975).

was certified. The trial court also certified a defendant class defined as:

> All municipalities in the State of Alabama which have levied a tax against businesses operating outside their individual city limits but within their police jurisdictions pursuant to *Ala. Code* § 11-51-206 (1975).

(C.R. 177-180).

Following certification of plaintiff and defendant classes, notices were sent by Petitioners' counsel to approximately 292 municipalities. A portion of those municipalities were subsequently dismissed by stipulation. The total number of municipalities within the defendant class is approximately 279. (C.R. 193-4, 195-206).

In September of 1997 the trial court held oral arguments on plaintiffs' and defendants' Motions for Summary Judgment, defendants' Motion to Decertify Classes, defendants' Motion for Pre-trial Evidentiary Ruling, and other matters. Following those oral arguments, on October 3, 1997, Petitioners filed an Amended Complaint asserting that Oliver & Wright cannot be legally required to collect an unconstitutional tax, seeking to add Ed Wright (an individual) as an additional plaintiff, and seeking to certify an additional plaintiff class made up of individual consumers who have paid sales taxes enacted pursuant to *Ala. Code* § 11-51-206 (1975) on purchases made outside the corporate limits of cities within the State of Alabama but within the police jurisdiction of those cities. Petitioners also filed a Motion to Certify Plaintiff Class of individuals represented by Ed Wright on that same day. (C.R. 591-603).

On November 13, 1997 the trial court issued an order which became the subject of an interlocutory appeal to the Supreme Court of Alabama. That order, in pertinent part, reads as follows:

> 1. Defendant Albertville's Alternative Motion to Strike or Dismiss Plaintiff's Amended Complaint is granted without prejudice to the right of Plaintiff to refile the Amended Complaint and Motion to Certify Additional Plaintiff Class.
>
> 2. Defendant Albertville's Motion for Pre-trial Evidentiary Ruling is granted and further, it is found that Plaintiff does not have the burden to affirmatively prove, as an element of its constitutional attack upon "sales tax" statutes and ordinances with respect to Defendant Albertville and each of the other Municipalities, that there is not a reasonable relationship between the revenues from such sales taxes and/or from the combination of sales taxes and license taxes/fees from police jurisdictions and the costs

> necessary to provide services to the police jurisdiction.
>
> 3. Defendants' Motions to Decertify Classes are denied.
>
> 4. Defendants' Motions for Summary Judgment are denied.
>
> 5. Plaintiffs' Motion for Summary Judgment is denied.
>
> 6. Rulings on other motions and matters are deferred until any appeals concerning this ruling are resolved.

(C.R. 752-756).

On November 26, 1997, Respondent Albertville filed a Petition for Permission to Appeal and Petition for Writ of Mandamus in the Alabama Supreme Court. The City of Hoover also filed a Petition for Permission to Appeal. On February 3, 1998, the Alabama Supreme Court granted permission for both appeals on two issues:

> I. Whether municipalities can constitutionally exercise the powers delegated to them by the Alabama State Legislature contained in § 11-51-206, Code of Alabama (1975) which allows them to impose sales taxes on retail consumers for purchases from businesses located outside the corporate limits but within their respective police jurisdiction.
>
> II. Whether a business located outside the corporate limits of a municipality but within its police jurisdiction has standing to challenge the constitutionality of the sales tax imposed on retail consumers pursuant to § 11-51-206, Code of Alabama (1975).

On March 26, 1999 the Supreme Court of Alabama reversed the trial court and remanded with directions

finding that while Petitioners had standing, the statute at issue was constitutional.

(II) Statement of Facts with References to Record.

The facts upon which this suit turns are undisputed. Petitioner Oliver & Wright Motors, Inc. is a business located outside the city limits of Albertville but within its police jurisdiction. The City of Albertville assessed a sales tax which is collected by Alabama Department of Revenue. (C.R. 134).

The City of Albertville passed a sales tax ordinance which was based upon, and copied from, the Alabama sales tax statute. (Howren Deposition, page 16).[1] The City of Albertville had a license fee tax which also taxed businesses based on a percentage of gross receipts, but which was collected by the City of Albertville.

The Alabama Department of Revenue collected the sales tax for the City of Albertville and collects for other cities which request it to do so. (C.R. 58-107). The Alabama Department of Revenue collects or has collected local sales taxes in police jurisdictions for over 100 cities in the State of Alabama. (C.R. 69, 84-107).

The legislative history of *Ala. Code* §§ 11-51-200 through 11-51-206 (1975) makes it clear that the sales tax collected by the Alabama Department of Revenue for municipalities is solely a revenue generating tax. General Acts of Alabama 1969, No. 917 p. 1653 is the predecessor to the current *Ala. Code* § 11-51-200 (1975) and it serves as the legislative basis for *Ala. Code* §§ 11-51-200, 11-51-202, and 11-51-206 (1975). Act No. 917, which is set forth in the appendix, empowers all cities and towns to provide by ordinance for the levy of all sales taxes parallel to the

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[1]The Howren deposition is attached to the Clerk's Record.

levy of sales taxes by the state in *Ala. Code* §§ 40-23-1, 40-23-2, 40-23-4, 40-23-6 through 40-23-32, and 40-23-34 through 40-23-36 (1975). Act No. 917 and the code sections referred to therein were enacted pursuant to the Legislature's passage of Act No. 100, pg. 298, H. 94, Second Special Session 1959. The short title to that act, of which relevant portions are included in the appendix for the Court's convenience, reads **"[t]o raise revenue"** *Id.* (emphasis supplied). This short title unambiguously states the legislative intent and purpose of the statute at issue in this case, *Ala. Code* § 11-51-206 (1975).

Ala. Code § 11-51-91 (1975) enables municipalities to regulate the police jurisdiction and compensate itself for services provided to the police jurisdiction through a license fee. The full text of this statute appears in the appendix.

ARGUMENT

(I) Amplification of Reasons for Allowance of Writ

The imposition of a tax by a local government on activities and persons outside of its boundaries, solely to generate revenue, constitutes the taking of property without due process of law and violates the due process guarantees of the Fourteenth Amendment to the United States Constitution.

Ala. Code § 11-51-206 (1975) allows municipalities to impose sales taxes on purchases from businesses located outside the city limits but within the city's police jurisdiction. The sole purpose of the sales tax is to raise revenue for the local municipal government. As was concluded by the Alabama Supreme Court, "we are not presented with a statute that grants only regulatory or licensing authority but under which a municipality improperly attempts to raise general revenues." *City of Hoover v. Oliver & Wright*

Motors, Inc., Nos. 1970366, 1970368, 1999 WL 164225, at *3 (Ala. 1999). Having reached what appeared to be the first conclusion on a path to finding the tax is constitutionally impermissible, the Alabama Supreme Court bizarrely changed horses mid-stream and held that the tax bears a rational relationship to a legitimate interest of the state legislature. *Id.* at *5.

In *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940), this Court enunciated the test for determining whether taxes constitute the taking of property without due process of law. The issue was whether an income tax levied against an out of state corporation doing business in Wisconsin on earnings derived from property located, and business transacted, in the state (assessed at the point dividends were paid out) offended the Fourteenth Amendment. *Id.* In reaching its conclusion that the Wisconsin tax did not offend the Fourteenth Amendment the Court explained:

> That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

311 U.S. at 444. Finding that J.C. Penney had enjoyed the substantial privilege of carrying on business in Wisconsin, this Court found that the tax was supported. *Id.* at 444-445.

Utilizing the same test in the instant case, the question becomes whether the taxing power exerted by the municipality bears fiscal relation to protection, opportunities and benefits given by the municipality. Petitioners contend that it does not. The Alabama statute challenged here allows a municipality to raise revenue from the po-

lice jurisdiction which lies outside its municipal borders and has no representation in the municipal government. There is no connection between this revenue producing tax and any service or privilege that the municipality provides within its police jurisdiction.

In its opinion, the Alabama Supreme Court adopted several reasons for concluding that the tax bears a rational relationship to a legitimate interest of the state legislature. Those reasons are:

> First, the legislature reasonably could have determined that if a municipality was not authorized to impose a sales tax in its police jurisdiction, local merchants might opt to conduct their businesses just outside the city limits, thus avoiding the burden of a sales tax while simultaneously enjoying most, if not all, of the benefits provided by the municipality within its city limits. Second, the legislature reasonably could have assumed that those businesses engaging in commercial activities within municipal police jurisdictions enjoy tangible and intangible benefits that result from those business' close proximity to the municipality, and that those benefits are comparable, and frequently identical, to those enjoyed by businesses operating within the corporate limits; and that this fact makes it appropriate for those businesses within the police jurisdiction to share directly in the burden of financing the expenses generally associated with providing those benefits. Third, the legislature reasonably could have concluded that authorizing a municipality to access an expanded sales-tax base would allow the per capita sales-tax burden to be shouldered more equitably by all those benefitting from municipal revenue. Fourth, the legislature reasonably could have assumed that without an expanded sales-tax base,

> a municipality would be more likely to annex adjoining areas for the sole purpose of raising additional revenue, rather than for the purpose of supporting the growth of its citizenry.

City of Hoover v. Oliver & Wright Motors, Inc., Nos. 1970366, 1970368, 1999 WL 164255, at *4 (Ala. 1999). Each reason ignores the legislature's enunciated purpose in enacting the police jurisdiction sales tax—to raise revenue. The Alabama Supreme Court also ignores its own conclusion to the same effect, *supra*. The reasons the Alabama Supreme Court finds to support the tax are reasons that a state may enact, and has enacted, taxes and fees pursuant to its police powers. However, this is not what the State Legislature has accomplished here. Here, the legislature has passed a statute which allows a municipality to raise revenue from transactions occurring beyond its borders involving individuals and businesses not represented in the municipal government, and not allowed to vote on imposition of the tax. The Alabama Supreme Court attempts to allay this travesty by stating that police jurisdiction residents had an opportunity to participate in the election of members of the state legislature body that adopted the challenged statute. This reasoning ignores the critical fact that the statute here is merely an enabling provision. It was the municipal governments, in which the police jurisdiction residents have no voice, that enacted the taxes here in issue.

Petitioner is aware of no case, prior to the Alabama Supreme Court's decision in this matter, in which it has been held that a governmental entity may tax activities outside of its borders that have no relationship to the entity, solely to generate revenue for that entity. Petitioners can conceive of no rational reason to grant such powers to a governmental entity when the inherent danger in such an authorization is so readily apparent.

In this case, the distinction between statutes allowing local governments to levy extraterritorial taxes in the exercise of their police powers and statutes which allow local governments to levy extraterritorial taxes to raise revenue is crucial. This issue was addressed by this Honorable Court in *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978). In that case this Court reviewed the relationship between municipalities and police jurisdictions established under Alabama law and the authority of a municipality to levy taxes under its police power outside the city limits, but within the police jurisdiction. After denying the voting rights issues, this Court asked whether "the Alabama statutes giving extraterritorial force to certain municipal ordinances and powers bear some rational relationship to a legitimate state purpose." *Holt Civic Club, supra,* at 70. In addressing this point, Justice Rehnquist explained:

> The Alabama Legislature could have decided that municipal corporations should have some measure of control over activities carried on just beyond their "city limit" signs, particularly since today's police jurisdiction may be tomorrow's annexation of the city proper. Nor need the city's interests have been the only concern of the legislature when it enacted the police jurisdiction statutes . . . Unincorporated communities like Holt dot the rim of most major population centers in Alabama and elsewhere, and state legislatures have a legitimate interest in seeing that this substantial segment of the population does not go without basic municipal services such as police, fire, and health protection. Established cities are experienced in the delivery of such services, and the incremental costs of extending the city's responsibility in these areas to surrounding environs may be substantially less than the expense of establishing

> wholly new service organizations in each community.

Holt Civic Club, supra, at 74. Accordingly, a majority concluded it was not unreasonable for the Alabama Legislature to require police jurisdiction residents to pay for the services they receive from a city through license fees. *Id.* Additionally, this Court indicated that a limitation on the municipality's ability to tax its police jurisdiction residents was appropriate: "[t]he statutory limitation on license fees to half the amount exacted within the city assures that police jurisdiction residents will not be victimized by the city government." *Id.*

The present tax, authorized by *Ala. Code* § 11-51-206, is wholly unlike the tax approved by this Court in *Holt Civic Club.* This sales tax was enacted to allow municipalities to raise revenue rather than to provide municipalities with a mechanism to ensure that police jurisdiction residents shouldered the burden and expense of providing them services. Nothing limits a municipality in its use of this revenue; it may use it for whatever purpose it deems appropriate. As such, this tax goes too far; it victimizes the residents of the police jurisdiction.

In *Holt Civic Club, supra,* this Court cited David E. Hunt's University of Chicago Law Review comment entitled *The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities,* 45 U. Chi. L. Rev. 151 (1977), for the statement that "35 States authorize their municipal subdivisions to exercise governmental powers beyond their corporate limits", and that "[a]lthough the extraterritorial municipal powers granted by these States vary widely, several States grant their cities more extensive or intrusive powers over bordering areas than those granted under the Alabama statutes." *Id.* at 72.

This article further explains:

> In all instances the power wielded by the elected officials derives from the police power of the state . . . In short, each of the types of delegated police power involves the exercise of governmental power over citizens who have no political influence over the exercise of that power.

45 U. Chi. L. Rev. 151, 157 (1977). Moreover, all of the judicial decisions which upheld due process challenges to extraterritorial regulation maintained one limitation:

> . . . courts drew a distinction between the extraterritorial imposition of license fees, which was permissible, and extraterritorial taxation, which was not.

45 U. Chi. L. Rev. 151, 159 (1977). Clearly, the sales tax at issue in this case is not levied pursuant to police powers. It is a revenue producing extraterritorial tax which cannot withstand this Court's scrutiny because it victimizes the residents of the police jurisdiction. As such, the levy of this tax constitutes the taking of property without due process of law and violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

The Alabama Supreme Court has set a dangerous precedent by authorizing municipalities to generate revenue from transactions which have no connection with the municipality from persons and businesses which have no voice in the municipal government which makes that decision. This practice violates the United States Constitution and runs afoul of the opinions of this Honorable Court.

Wherefore, Petitioners request that their Petition be granted and that the decision of the Alabama Supreme Court be reversed.

Respectfully Submitted,

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